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Nos. 82-524, 82-545 and 82-551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BALTIMORE GAS AND ELECTRIC CO., *et al.*, *Petitioners*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *Respondent.*

UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA, *Petitioners*,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*, *Respondents.*

COMMONWEALTH EDISON COMPANY, *et al.*, *Petitioners*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*, *Respondents.*

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE ATOMIC INDUSTRIAL FORUM AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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BRIEF OF THE ATOMIC INDUSTRIAL FORUM AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

In accordance with Rule 36 of this Court, the Atomic Industrial Forum ("the Forum") has received and filed

with this Court the written consents of counsel for each of the parties to appear as *amicus curiae* in this proceeding.

This brief is submitted by the Forum in support of the petitions for certiorari filed by Baltimore Gas and Electric Co., *et al.* (No. 82-524), Commonwealth Edison Company, *et al.* (No. 82-551), and the Nuclear Regulatory Commission and United States of America (No. 82-545) seeking review of the Court of Appeals' decision in *Natural Resources Defense Council, Inc., et al.* v. *Nuclear Regulatory Commission, et al.*, Nos. 74-1586, 77-1448, 79-2110, 79-2131 (D.C. Cir. April 27, 1982). The opinion of the Court of Appeals appears in Petitioners' Appendix at 1a-181a (hereafter "Pet. App. ____").

INTEREST OF THE ATOMIC INDUSTRIAL FORUM

The Forum is an association of about six hundred domestic and overseas organizations involved in the peaceful uses of nuclear energy. The membership includes electric utilities, manufacturers, architect/engineer/construction firms, service organizations, consultants, uranium producers, radionuclide and radiopharmaceutical suppliers, financial institutions, universities, labor unions, government agencies and research laboratories. Forum members are involved in all phases of construction and operation of nuclear facilities including each stage of the uranium fuel cycle.

One hundred and five of the Forum's 122 domestic electric operating utility members rely on, or plan in the future to rely on, nuclear power generation for at least a portion of their power needs. The Court of Appeals' decision adversely affects the interests of the Forum's members by casting a cloud over all construction permits and operating licenses issued since publication of the original Table S-3 rule on April 22, 1974. In addition, all applica-

tions under review by the Nuclear Regulatory Commission ("NRC" or "Commission") and all future planning with respect to the choice of nuclear power as a source of electricity fall under the same cloud of regulatory uncertainty.

The lower court's decision creates another in a series of significant impediments to the continued private development of nuclear power. The Forum has an exceptional interest in seeking to remove unwarranted obstructions to this development so that its members may have the broadest possible range of energy sources available as each plans for the future energy needs of our nation.

SUMMARY OF ARGUMENT

The majority decision of the Court of Appeals invalidates for the second time the Commission's carefully considered "Table S-3 rule" which quantifies the environmental effects of the uranium fuel cycle. The petitions for writs of certiorari should be granted because the lower court decision is clearly wrong under precedents of this Court. The decision is also inconsistent with Congressional objectives in the field of nuclear energy and contrary to the national interest of securing reliable alternative energy sources.

ARGUMENT

A. The Decision Of The Court Of Appeals Is An Unwarranted Incursion Into Agency Decisionmaking In Violation Of The Decisions Of This Court.

We agree with Judge Wilkey's conclusion that "the analysis and resolution of the central issues are comparatively simple"—the Commission complied fully with all relevant statutes and engaged in "reasoned decisionmaking" on the policy and technical issues in the

Table S-3 generic rulemaking.[1] The Court of Appeals has usurped the policy and technical decisionmaking functions of the NRC and Congress and has imposed procedural constraints on the Commission's actions beyond those required by law in violation of the decisions of this Court in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978) (hereafter "*Vermont Yankee II*"), and *Strycker's Bay Neighborhood Council* v. *Karlen*, 444 U.S. 223 (1980).

The nearly ten years of generic rulemaking conducted by the NRC and its predecessor agency, the Atomic Energy Commission, is described ably in the parties' Petitions in this case. This comprehensive rulemaking resulted in (1) an initial Table S-3 rule promulgated on April 22, 1974,[2] (2) an interim fuel cycle rule promulgated in 1977 in response to the decision of the Court of Appeals vacating the initial rule,[3] (3) a clarifying amendment to the interim rule,[4] and (4) a final fuel cycle rule published on August 2, 1979.[5] There can be no disagreement with the conclusion that in this lengthy process the NRC took a hard look at *all* of the relevant factors in its consideration of the environmental effects of the uranium fuel cycle, including extensive analyses of the uncertainites which are the focus of the majority opinion.[6] The NRC technical

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[1] Pet. App. 119a, 121a (Wilkey, J. dissenting).

[2] 39 Fed. Reg. 14,188, Pet. App. 224a *et seq.*

[3] 42 Fed. Reg. 13,803, Pet. App. 240a *et seq.*

[4] 43 Fed. Reg. 15,613, Pet. App. 259a *et seq.*

[5] 44 Fed. Reg. 45,362, Pet. App. 341a *et seq.*

[6] References in the Court's opinions to full disclosure by the NRC of the uncertainties, methodology and assumptions implicit in the Table S-3 rules are numerous. Pet. App. 27a, 35a, 41a, 46a and 48a

staff's assumptions underlying the rules invalidated by the Court of Appeals were ultraconservative, thus allowing the Commission to conclude in its final Table S-3 rule, *inter alia*, "that taking post-sealing releases as zero does not significantly reduce the overall conservatism of the table."[7]

Nevertheless, a majority of the Court of Appeals invalidated all iterations of the Table S-3 rule because the Court disagreed with both the final result of and the methodology underlying the rules, and with the generic rulemaking procedures employed to arrive at the rules. The majority opinion characterized the Commission's rules as constituting "either a failure to consider a relevant factor or a clear error in judgment."[8] The result is

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(Bazelon, J.); see also Pet. App. 165a-166a (Wilkey, J. dissenting). To the extent that the majority opinion is concerned about whether a long term waste disposal facility will ever be built (Pet. App. 45a, Bazelon, J.), we believe that issue (and its related uncertainties) is a matter for the attention of the Congress. *NRDC* v. *NRC*, 582 F.2d 166 (2d Cir. 1978); *but see State of Minnesota* v. *NRC*, 602 F.2d 412 (D.C. Cir. 1979).

[7] Pet. App. 370a. Descriptions of the conservatism in the agency's analyses are described in some detail in the Petition of Baltimore Gas and Electric Co., *et al.*, pps. 8-10; Petition of the Nuclear Regulatory Commission and United States of America, pps. 11-13; and Petition of Commonwealth Edison Company, *et al.*, pps. 22-24.

[8] Pet. App. 49a (Bazelon, J.) The majority opinion also characterized the original and interim versions of the Table S-3 rule as preventing licensing boards in individual power plant proceedings from considering the health, socioeconomic and cumulative impacts of fuel cycle activities. (Pet. App. 57a, Bazelon, J.). This characterization is completely erroneous, as noted by the government in its Petition.

succinctly described by Judge Wilkey in his dissent as follows:

> Notwithstanding the Supreme Court's clear guidelines, however, Judge Bazelon has again strayed beyond judicial province to register his dissatisfaction with the methodology underlying the Table S-3 Rule and to prescribe "procedural" mandates which, however promotive of an ideal that environmental concerns play a vital role in government decisionmaking, simply are not among those required by Congress under NEPA.[9]

As in 1978 in the landmark *Vermont Yankee II* decision, this Court should review the Court of Appeals', decision and correct the excesses therein. It was not appropriate for a majority of the Court of Appeals in this case to "stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Vermont Yankee II*, *supra*, 435 U.S. at 549 (1978). Nor is it appropriate for the court to eliminate essential agency discretion in a case where the agency has fully complied with the National Environmental Policy Act ("NEPA") on the basis of an adequate technical record. *See Strycker's Bay Neighborhood Council* v. *Karlen*, 444 U.S. 223, 227-228 (1980). The decision of the Court of Appeals, if not reversed, would change the role of NEPA in the agency

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Petition of the Nuclear Regulatory Commission and United States of America, pps. 19-20. This judicial construction of the NRC's rules is not only wrong but also is in clear violation of the well-established principle that an agency's interpretation of its own regulations is entitled to great weight. *See Northern Indiana Public Service Co.* v. *Izaak Walton League*, 423 U.S. 12, 15 (1975).

[9] Pet. App. 160a (Wilkey, J. dissenting), footnote omitted.

decisionmaking process and would allow substitution of the Court's view for the substantive policy determinations of the agency.

B. The Court Of Appeals' Ruling Is Contrary To The Intent Of Congress And To The National Interest.

The decision below imposes yet another formidable barrier to the private development of commercial nuclear power as an alternative energy source. This result is contrary to the Congressional objective of providing for "a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public."[10]

This case, together with the D.C. Circuit's recent decision in *People Against Nuclear Energy* v. *NRC*, 678 F.2d 222 (D.C. Cir. 1982), petitions for cert. pending, Nos. 81-2399 and 82-358, may cause all pending licensing cases to be delayed while the NRC engages in burdensome and duplicative re-analysis of the fundamental technical and

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[10] 42 U.S.C. § 2013(d) (1976); *see also* 42 U.S.C. §§ 2011(b), 2012(a), 2013(a) and 2013(c). Since enactment of the Atomic Energy Act of 1954, Congress has reaffirmed the importance of nuclear energy for the national security and economy of the nation by enacting the Price-Anderson Act of 1957, 42 U.S.C. §§ 2012(i), 2210 (1976 & Supp. IV 1980), and by extending that Act in 1965 (Pub. L. No. 89-210, 79 Stat. 855 (1965)) and 1975. (Pub. L. No. 94-197, 89 Stat. 1111 (1975)).

policy decisions with which the lower court disagrees.[11] The resource and dollar costs associated with complying with the Court's decision will ultimately be borne by the utility, its customers and society, and our nation's efforts to reduce our dependence on dwindling domestic energy resources and undependable foreign energy sources will be hindered severely. Such a result is contrary to the national interest.

This Court must once again strike down judicially imposed obstacles to nuclear power development which are so clearly violative of its directives. The oft-quoted closing statement in *Vermont Yankee II*, *supra*, 435 U.S. at 557-558 continues to be dispositive:

> Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment. (Emphasis in the original.)

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[11] Five cases involving challenges to individual licenses issued by the NRC and based in part on the invalidated Table S-3 rules are now pending in the Courts of Appeals. These cases are identified in the Petition filed by Baltimore Gas and Electric Co., *et al.*, p.5, n.7. Attempts to raise Table S-3 issues in pending NRC administrative proceedings have also been made, and more attempts to reopen completed licensing proceedings based on Table S-3 grounds are expected.

CONCLUSION

The decision of the Court of Appeals is so clearly erroneous as to justify summary reversal. If, however, this Court believes summary reversal is inappropriate, the issues involved here are so clearly important to maintaining the nuclear option that the petitions for writs of certiorari should be granted.

Respectfully submitted,

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